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No. 84-2019

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. BARNEY,
Petitioner,

v.

R. L. HALPERIN, STATE TAX ASSESSOR,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court Of the State of Maine

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ	
I. This court already has decided the issue of a state's jurisdiction to tax income which a nonresident earns from employment on a federal enclave located within the boundaries of that state	3
II. The Maine court's decision on proration is consistent with precedents of this court and does not give rise to a substantial federal question	4
Conclusion	9
Appendix	1a

TABLE OF AUTHORITIES

	Page(s)
Cases	
Adickes v. Kress & Co., 398 U.S. 144 (1970)	5
Austin v. New Hampshire, 420 U.S. 656 (1975)	6,8
Barney v. State Tax Assessor, 490 A.2d 223 (Me. 1985)	2
Berry v. State Tax Comm'n, 397 P.2d 780 (Or. 1964), *reh. den.* 399 P.2d 164 (1965), *app. dism.* 382 U.S. 16 (1965)	7
Burns v. Bureau of Revenue, Income Tax Division, 439 P.2d 702 (N.M. 1968), *cert. den.* 393 U.S. 841 (1968)	4
Commissioners of the Sinking Fund v. Howard, 248 S.W.2d 340 (Ky. 1952)	3
Goodwin v. State Tax Comm'n, 146 N.Y.S.2d 172 (App. Div. 1955), *aff'd mem.* 133 N.E.2d 711 (1956), *app. dism.* 352 U.S. 805 (1956)	7

Howard v. Commissioners of the Sinking Fund of the City of Louisville, 344 U.S. 624 (1953) 3,4

Kiker v. City of Philadelphia, 31 A.2d 289 (Pa. 1943), *cert. den.* 320 U.S. 741 (1943) 4

Lung v. O'Chesky, 617 P.2d 1317 (N.M. 1980), *app. dism.* 450 U.S. 961 (1981) 3,7,8

Morse v. Johnson, 282 A.2d 597 (Me. 1971) 2

New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937) 5

Shaffer v. Carter, 252 U.S. 37 (1920) 5,6

Spencer v. South Carolina State Tax Comm'n, 316 S.E.2d 386 (S.C. 1984), *aff'd on other grounds,* ____ U.S. ____, 105 S.Ct. 1859 (1985) ... 7

Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) 5,6

Wheeler v. Vermont, 249 A.2d 887 (Vt. 1969), *app. dism.* 396 U.S. 4 (1969), *reh. den.* 396 U.S. 949 (1969) 5,7,8

Wilson v. Dept. of Revenue, 514 P.2d 1334 (Or. 1973), *app. dism.* 416 U.S. 964 (1974) 7

Constitutional Provisions

U.S. Constitution, Art. IV, § 2, cl. 1 1,2,4

Statutes

4 U.S.C. § 106 1,2,3

36 M.R.S.A. § 5144-A (Supp. 1984-85) 4

36 M.R.S.A. § 5145 (Supp. 1984-85) 4

Other

S. Rep. No. 1625, 76 Cong., 3 Sess., p. 3 4

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BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Does the Buck Act, 4 U.S.C. § 106, recede jurisdiction to the State of Maine to tax the income which a nonresident earns from employment on a federal enclave located within the boundaries of Maine?
2. Does Maine's proration of personal exemptions and deductions to reflect the proportion of a nonresident's Maine income to total income violate the Privileges and Immunities Clause (Art. IV, § 2, cl. 1) of the Constitution of the United States?

STATEMENT OF THE CASE

Petitioner Robert W. Barney ("Barney") at all relevant times has been a resident of the State of New Hampshire but has been employed at the Portsmouth Naval Shipyard, a federal enclave located within the boundaries of the State of Maine. At all relevant times, Barney's wife, Mary L. Barney, was also a resident of the State of New Hampshire and was employed in that state.

For each of the calendar years 1980 and 1981, Barney and his wife filed a joint federal income tax return and a joint Maine nonresident income tax return. Because the Barneys had received income from both Maine and New Hampshire sources during 1980 and 1981, their itemized deductions and personal exemptions were prorated, for Maine income tax purposes, by the ratio of Maine income to total income.

In 1983, Barney filed a claim for a refund of 1980 and 1981 Maine income taxes paid. His claim was based upon two propositions: first, that Maine has no jurisdiction to tax the income earned by nonresidents in a federal enclave located within that state and, second, that, if Maine does have jurisdiction, the proration of the itemized deductions and exemptions of a nonresident violates the Privileges and Immunities Clause (Art. IV, § 2, cl. 1) of the Constitution of the United States. The State Tax Assessor denied the refund claim.

On *de novo* appeal, the York County Superior Court, on the basis of *Morse v. Johnson,* 282 A.2d 597 (Me. 1971), held that the State of Maine did have jurisdiction to tax Barney's income earned at the Portsmouth Naval Shipyard. (Petition for Writ of Certiorari ("Pet.") A-1). The Superior Court also held Maine's statutory proration of a nonresident's itemized deductions and exemptions to be constitutionally permissible. (Pet. A-1 — A-4).

On appeal, the Supreme Judicial Court of Maine held, as to jurisdiction, that *Morse* had correctly determined that the Buck Act, 4 U.S.C. § 106, had receded to Maine the jurisdiction to tax all incomes earned at the Portsmouth Naval Shipyard. *Barney v. State Tax Assessor,* 490 A.2d 223, 224 (Me. 1985) (Pet. A-5 — A-6). As to the privileges and immunities issue, the court concluded that a nonresident never has a greater Maine income tax liability than a resident with the same total income and, therefore, that the Maine proration statutes are constitutional. 490 A.2d at 224-226 (Pet. A-6 — A-9).

REASONS FOR DENYING THE WRIT

I. This court already has decided the issue of a state's jurisdiction to tax income which a nonresident earns from employment on a federal enclave located within the boundaries of that state.

Barney claims that the Buck Act, 4 U.S.C. § 106, does not recede jurisdiction to the states to tax income earned by nonresidents on lands which those states have ceded to the federal government. Instead, Barney argues, the Buck Act merely permits taxation where a state has acquired jurisdiction independent of that act. However, this court has construed the Buck Act so explicitly that no room is left for controversy. *Howard v. Commissioners of the Sinking Fund of the City of Louisville,* 344 U.S. 624 (1953). In *Howard,* this court held that the Buck Act specifically granted jurisdiction to the City of Louisville, as a taxing authority of Kentucky, to impose its occupational tax upon employees of a federal ordnance plant located on federally-owned land within the boundaries of that city "as if the Federal Government were not there." 344 U.S. at 627-628.[1] Consequently, this settled issue is not now, forty-five years after enactment of the Buck Act, a *substantial* federal question which would warrant the granting of certiorari.

Contrary to Barney's assertions (Pet. 6-7), the instant case is not distinguishable from *Howard* on the basis that the City of Louisville, in *Howard,* had annexed the land on which the federal ordnance plant was located and thereby had acquired jurisdiction to tax independent of the Buck Act. This court held that the annexation[2] did not interfere with the jurisdiction of the United States over the land on which the ordnance plant was located and, therefore, that whatever taxing jurisdiction the City of Louisville possessed had been derived directly from the Buck Act. 344 U.S. at 627.

[1]This court also has dismissed, for want of a substantial federal question, a subsequent appeal which raised, *inter alia,* essentially the same question. *Lung v. O'Chesky,* 617 P.2d 1317 (N.M. 1980), *app. dism.* 450 U.S. 961 (1981).

[2]The annexation was merely a reorganization of the municipal boundaries within the Commonwealth of Kentucky. *Commissioners of the Sinking Fund v. Howard,* 248 S.W.2d 340, 342 (Ky. 1952).

The fact that the Supreme Judicial Court of Maine did not address specifically Barney's argument relating to the language of the Buck Act (Pet. 7-11)[3] creates no conflict with *Howard,* but merely reflects the court's rejection of that argument. Such a rejection is entirely appropriate in view of 1) this court's clear decision in *Howard;* 2) the decision in *Kiker v. City of Philadelphia,* 31 A.2d 289 (Pa. 1943), *cert. den.* 320 U.S. 741 (1943), which rejected the position argued here; 3) the legislative history of the Buck Act, S. Rep. No. 1625, 76 Cong., 3 Sess., p. 3, which demonstrates an unequivocal congressional intent to recede taxing jurisdiction to the states; 4) Congress' acquiescence for more than 40 years in the result of *Kiker;* and 5) the consistent interpretation of the Buck Act by every other court which has considered the question. *See, e.g., Burns v. Bureau of Revenue, Income Tax Division,* 439 P.2d 702 (N.M. 1968), *cert. den.* 393 U.S. 841 (1968).

For the foregoing reasons, this court should deny certiorari as to the issue of whether the Buck Act constituted a grant to Maine of taxing jurisdiction over the Portsmouth Naval Shipyard.

II. The Maine court's decision on proration is consistent with precedents of this court and does not give rise to a substantial federal question.

Maine law requires that the personal exemptions and deductions of a nonresident be prorated to reflect the ratio of his Maine income to his total income. 36 M.R.S.A. §§ 5144-A, 5145 (Supp. 1984-85). Accordingly, a nonresident taxpayer who earns income both inside and outside Maine receives diminished exemptions and deductions and, therefore, pays more Maine income tax on his Maine income than a Maine resident who has the same Maine income but has no out-of-state income. Barney claims that this result constitutes a discrimination against similarly situated residents and nonresidents and, therefore, a violation of the Privileges and Immunities Clause (Art. IV, § 2, cl. 1) of the Constitution of the United States. The Supreme Judicial Court of Maine, however, correctly concluded that tax-

[3]This argument is based upon the dissenting opinion in *Kiker v. City of Philadelphia,* 31 A.2d 289 (Pa. 1943), *cert. den.* 320 U.S. 741 (1943).

payers are similarly situated when they have the same *total* income, not the same Maine income,[4] and, therefore, rejected Barney's analysis.[5] 490 A.2d at 225 (Pet. A-7). *See, Wheeler v. Vermont,* 249 A.2d 887, 890-891 (Vt. 1969), *app. dism.* 396 U.S. 4 (1969), *reh. den.* 396 U.S. 949 (1969).

In *Shaffer v. Carter,* 252 U.S. 37 (1920), this court held that a state constitutionally could impose an income tax upon income which a nonresident earned in that state and, because of that limited jurisdiction to tax his income, could limit the nonresident's deductions to those connected with the income earned in the taxing state. *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60 (1920), decided the same day as *Shaffer,* held that the Privileges and Immunities Clause was violated by the granting of a personal exemption to a resident taxpayer and the total denial of that exemption to a nonresident taxpayer. The decision of the Supreme Judicial Court of Maine is consistent with both *Shaffer* and *Travis,* neither of which has been construed by this, or

[4]A nonresident with $35,000 in Maine income and no income sourced without Maine (i.e., identically situated with the Maine resident in the left column of Barney's chart (Pet. 16)) would receive full Maine exemptions and deductions under the proration statutes and, therefore, would incur the same Maine income tax liability as the resident. Conversely, a Maine resident with $35,000 Maine-sourced income and $35,000 out-of-state income would receive full Maine exemptions and deductions but, under the principles of *New York ex rel. Cohn v. Graves,* 300 U.S. 308 (1937), would be taxed by Maine on his entire $70,000 income and thus would incur a substantially greater Maine income tax liability than the identically situated nonresident.

[5]The Supreme Judicial Court properly did not address Barney's objection, raised for the first time in oral argument at that court, to Maine's statutory requirement that nonresidents who elect to file a joint federal tax return must also file a joint Maine tax return. Because that issue, which is only incidentally connected with the proration issue, was not formally raised and briefed below, it has been waived and is not properly before this court on the instant petition. *See, Adickes v. Kress & Co.,* 398 U.S. 144, 147n.2 (1970) Furthermore, because of the income-splitting effect and additional exemptions and deductions available under joint filing, the Barneys' liability to Maine under that method was less than Robert Barney's individual liability would have been if he had filed separately.

any other, court to require more than prorated personal exemptions or nonbusiness deductions.[6]

Contrary to Barney's suggestion (Pet. 15), *Austin v. New Hampshire*, 420 U.S. 656 (1975), does not foreclose all consideration of the out-of-state circumstances of a multistate taxpayer in determining whether a violation of the Privileges and Immunities Clause has occurred. *Austin* merely held that a tax statute which discriminates against a nonresident cannot be upheld on the basis that the nonresident suffers no financial detriment because of a tax credit offered by his state of residence. The Maine proration statutes do not discriminate against nonresidents in favor of similarly situated residents, as demonstrated at page 5 of this brief. Furthermore, the obvious fairness of prorated exemptions and deductions has resulted in the adoption by other states of similar proration statutes and thus has enhanced, rather than disrupted, interstate comity.

Having failed to demonstrate an inconsistency between the instant case and this court's privileges and immunities decisions, Barney asserts (Pet. 12-13) that conflicting state court interpretations of this court's holdings in *Shaffer* and *Travis* give rise to a substantial federal question. However, the purported conflict relates to whether *Shaffer* and *Travis* require states to provide nonresident taxpayers with *prorated* nonbusiness deduc-

[6]Contrary to Barney's assertions (Pet. 18-19), the Maine court did not believe that personal exemptions and nonbusiness deductions are attributable to specific income in the sense of being expenses incurred in the production of that income. Instead, the court discerned a legislative presumption that deductible personal expenditures would be made pro-rata from the taxpayer's entire income and, therefore, that only the portion of those expenditures which was connected with the Maine income in the sense of being funded from that income appropriately was allowed as a personal deduction in the computation of the Maine income tax. 490 A.2d at 226 (Pet. A-8 — A-9). Similarly, the court concluded that the Maine legislature, in designating a certain level of a resident's income (the personal exemption) to be tax free, constitutionally obligated itself to provide a nonresident with no more than a pro-rata share of that exemption under the nonresident's particular circumstances. 490 A.2d at 226 (Pet. A-9).

tions as opposed to *no* nonbusiness deduction whatsoever.[7] The instant case decided a different issue — whether Maine is required constitutionally to provide a nonresident taxpayer with *full*, as opposed to *prorated*, personal exemptions and nonbusiness deductions. On this issue, there is no conflict between courts. No court has ruled that a state must accord full personal exemptions and nonbusiness deductions to a nonresident taxpayer regardless of how small a portion of his income is earned in that state. In fact, whenever the issue of full, versus prorated, exemptions and deductions has been presented to it, this court has declined to grant review on the basis that the appeal did not present a substantial federal question. *Lung v. O'Chesky*, 617 P.2d 1317 (N.M. 1980), *app. dism.* 450 U.S. 961 (1981); *Wheeler v. Vermont*, 249 A.2d 887 (Vt. 1969), *app. dism.* 396 U.S. 4 (1969), *reh. den.* 396 U.S. 949 (1969).

Further, the impact of the instant proration decision is much more limited than Barney argues (Pet. 12) and, therefore, does not render the issue a substantial federal question. Because most

[7]It is unlikely that a conflict which merits this court's attention exists even as to the issue discussed by Barney. Three of the cases which Barney cites (Pet. 13) as indicative of conflict between the courts are New York cases which demonstrate a trend toward proration, rather than absolute denial, of nonbusiness deductions in that state's interpretations. Resolution of any conflicts among those decisions is best left to the courts of New York.

Furthermore, *Spencer v. South Carolina State Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), *aff'd on other grounds*, _____ U.S. _____, 105 S.Ct. 1859 (1985) did not overturn the denial of prorated nonbusiness deductions *per se* but, rather, held that South Carolina's conditioning of proration upon similar treatment of nonresidents by the taxpayer's state of residence violated the Privileges and Immunities Clause. Also, this court has summarily denied several appeals in which nonresident taxpayers challenged the taxing state's position that *no* nonbusiness deduction must be provided to them. *Wilson v. Dept. of Revenue*, 514 P.2d 1334 (Or. 1973), *app. dism.* 416 U.S. 964 (1974); *Berry v. State Tax Comm'n*, 397 P.2d 780 (Or. 1964), *reh. den.* 399 P.2d 164 (1965), *app. dism.* 382 U.S. 16 (1965); *Goodwin v. State Tax Comm'n*, 146 N.Y.S.2d 172 (App. Div. 1955), *aff'd mem.* 133 N.E.2d 711 (1956), *app. dism.* 352 U.S. 805 (1956).

states, including Maine, tax 100% of the income earned by their residents[8] and provide a credit for any income tax paid by those residents to another state, the net effect of an individual's multistate tax exposure ordinarily is that he will pay income tax upon 100% of his income and receive 100% of the personal exemptions and deductions provided by his state of residence.[9] In those instances, the taxpayer's total liability to all taxing jurisdictions is unchanged, and proration alters only the distribution of his tax payments among the taxing jurisdictions entitled to share in those payments.[10] Accordingly, only those individuals who are residents of the few states which do not have a personal income tax and who also earn income outside those states have been motivated to challenge the proration of exemptions and deductions. *See, e.g., Lung* (Texas resident challenging New Mexico proration); *Wheeler* (New Hampshire resident challenging Vermont proration). Only those individuals — a small fraction of the "millions" asserted by Barney — are affected by the Supreme Judicial Court's recent decision, and they are affected only in the sense that a long-standing and legally correct result which they find financially unsatisfying remains unchanged.

Because the decision of the Supreme Judicial Court of Maine is consistent with the precedents of this court and because the issue does not present a substantial federal question, this court should not grant certiorari with respect to the issue of the constitutionality of Maine's proration statutes.

[8]Nine states, including New Hampshire, have no general income tax. CCH State Tax Guide, paras. 15-000 *et seq.*

[9]In this application, the credit does not offset the financial effect of another state's discrimination against its nonresidents, as in *Austin,* but, rather, has the effect of prorating a resident's income, exemptions and deductions.

[10]If a state provides a full, rather than prorated, exemption to a nonresident taxpayer, the taxpayer's liability to that state and, accordingly, the credit he receives from his state of residence are decreased. The reduced credit, in turn, increases the taxpayer's liability to his state of residence. Consequently, if the exemptions and deductions are the same in both states, the state of nonresidence will have borne the entire burden of funding the taxpayer's exemptions and deductions even though it taxes only part of his income.

CONCLUSION

For the reasons set out above, the Court should deny the petition for writ of certiorari.

DATED: July 31, 1985

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APPENDIX

U.S. Const., Art. IV, § 2, cl. 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

4 U.S.C. § 106 (The Buck Act)

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

36 M.R.S.A. § 5144-A (Supp. 1984-85)

§ 5144-A. Itemized deductions

The itemized deductions of a nonresident individual shall be determined in accordance with the provisions for a resident individual as contained in section 5125 and multiplied by a percentage arrived at by dividing the nonresident's adjusted gross income from sources within this State by his adjusted gross income he would be required to report if he were a resident.

36 M.R.S.A. § 5145 (Supp. 1984-85)

§ 5145. Personal exemptions

A nonresident individual shall be allowed the personal exemptions allowed to resident individuals under section 5126, multiplied by a percentage arrived at by dividing the nonresident individual's adjusted gross income from sources within this State by his adjusted gross income he would be required to report if he were a resident.